

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
GARRETT E. BROWN, JR.
CHIEF JUDGE

CLARKSON S. FISHER BLDG. AND U.S. COURTHOUSE
402 EAST STATE STREET ROOM 2020
TRENTON, NEW JERSEY 08608

January 12, 2011

LETTER ORDER

RE: *United States v. DiModica*, Criminal No. 98-114

Before the Court are Defendant's post-conviction petitions for relief (*see* Doc. Nos. 165, 166, 175) from the judgment of conviction entered on November 13, 1998. Defendant presently seeks (1) a writ of *audita querela* on the ground that this Court's jury instructions improperly expanded upon the RICO charge presented in the indictment, and (2) a new trial, on the grounds that this Court should have recused itself from the underlying trial.

The Government argues, and the Court agrees, that Defendant's requests for post-conviction relief are jurisdictionally barred pursuant to 28 U.S.C. § 2255(h). This provision provides that "[a] second or successive motion must be certified as provided in [28 U.S.C. §] 2244 by a panel of the appropriate court of appeals to contain (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h); *see also United States v. Baptiste*, 223 F.3d 188, 190 n.2 (3d Cir. 2000) (*per curiam*); *cf.* 28 U.S.C. § 2244(b)(2)–(3) (requiring same showing and certification by court of appeals for a defendant to bring a successive habeas petition). This limitation on successive post-conviction motions divests the Court of jurisdiction to hear such claims unless the moving party has obtained a certificate of appealability from the court of appeals. *E.g.*, *United States v. Trader*, 328 F. App'x 111, 112 (3d Cir. 2009); *United States v. Rodriguez*, 327 F. App'x 327, 329 (3d Cir. 2009). The instant motions present claims attacking Defendant's conviction and sentence that should have been brought in a § 2255 motion to vacate his sentence. Defendant has not shown there to be a gap in the availability of post-conviction remedies, and Defendant may not bypass the limitations on successive § 2255 motions by nominally seeking a writ of *audita querela* or filing a post-trial motion for recusal. *See Massey v. United States*, 581 F.3d 172, 174 (3d Cir. 2009) (affirming district court's conclusion that petitioner could not present § 2255 claim as a petition for a writ of *audita querela* in order to avoid § 2255's limitation on successive motions); *see also Baptiste*, 223 F.3d at 189–90 (same, petition seeking writ of *coram nobis*).

This Court denied Defendant's initial § 2255 motion on June 13, 2002, and the Third Circuit denied a certificate of appealability on June 24, 2003. *DiModica v. United States*, Civ. No. 01-1800, Doc. Nos. 9 (order denying petition), 12 (judgment of court of appeals). Defendant has not obtained a certificate of appealability for the present claims. Accordingly, this Court lacks jurisdiction over these claims, and it is hereby ORDERED that Defendant's requests for

post-conviction relief (Doc. Nos. 165, 166, 175) are DENIED. Should Defendant decide to bring successive collateral actions challenging his conviction and/or sentence, he must obtain a certificate of appealability from the U.S. Court of Appeals for the Third Circuit, upon a showing of new evidence or a new constitutional rule made retroactive by the Supreme Court of the United States.

/s/ Garrett E. Brown, Jr.
Garrett E. Brown, Jr., Chief Judge
United States District Court